

**TRANSPORTATION DEPARTMENT[761]**

**Notice of Intended Action**

**Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.**

Pursuant to the authority of Iowa Code sections 305.15, 307.10 and 307.12, the Iowa Department of Transportation hereby gives Notice of Intended Action to amend Chapter 4, “Public Records and Fair Information Practices,” Iowa Administrative Code.

Proposed amendments within Items 1 to 5 update Chapter 4 to reflect the technological changes in the way records are now created, stored, requested and accessed; correct the address of the records center; clarify rule language; correct citations, implementation statutes, and implementation sentences; and comply with Iowa Code sections 22.8 and 23.6. The proposed amendment in Item 6 rewrites the rule concerning confidential records to eliminate several subrules that were simply repeating Iowa Code section 22.7, add a new subrule to include all records that are exempt from disclosure under Iowa Code section 22.7, and correct and add other subrules to comply with Iowa Code sections 21.5(1)“j,” 22.2, 22.7, 321.11A and 804.29.

These rules do not provide for waivers. Any person who believes that the circumstances meet the statutory criteria for a waiver may petition the Department for a waiver under 761—Chapter 11.

Any person or agency may submit written comments concerning these proposed amendments or may submit a written request to make an oral presentation. The comments or request shall:

1. Include the name, address, and telephone number of the person or agency authoring the comments or request.
2. Reference the number and title of the proposed rule, as given in this Notice, that is the subject of the comments or request.
3. Indicate the general content of a requested oral presentation.
4. Be addressed to Tracy George, Rules Administrator, Iowa Department of Transportation, Office of Policy and Legislative Services, 800 Lincoln Way, Ames, Iowa 50010; Internet e-mail address: [tracy.george@dot.iowa.gov](mailto:tracy.george@dot.iowa.gov).
5. Be received by the Office of Policy and Legislative Services no later than May 19, 2015.

A meeting to hear requested oral presentations is scheduled for Thursday, May 21, 2015, at 10 a.m. in the Administration Building, First Floor South Conference Room, Iowa Department of Transportation, 800 Lincoln Way, Ames, Iowa.

The meeting will be canceled without further notice if no oral presentation is requested.

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code sections 21.5(1), 22.2, 22.7, 22.8, 23.6, 321.11A and 804.29.

The following amendments are proposed.

ITEM 1. Amend rule 761—4.1(22,304) as follows:

**761—4.1(22,304 305) General provisions.**

**4.1(1) Scope of chapter.**

a. and b. No change.

c. This chapter does not make available records compiled by the department in reasonable anticipation of court litigation or formal administrative proceedings. The availability of these records to the public or to any subject individual or party to such litigation or proceedings shall be governed by applicable legal and constitutional principles, statutes, rules of discovery, evidentiary privileges, and applicable regulations of the department.

**4.1(2) Custodian.** The custodian of a record is the person who heads the departmental office responsible for that record. The department's electronic Records Management Manual identifies the offices that are responsible for particular records.

a. No change.

b. ~~The A~~ custodian's ~~designees~~ designee may include but ~~are~~ is not limited to the records center and the department's general counsel.

c. No change.

**4.1(3) Address of records center.** The address of the department's records center is: Records Center Management Section, Office of Document Services Information Technology Division, Iowa Department of Transportation, 800 Lincoln Way, Ames, Iowa 50010.

**4.1(4) Records Management Manual.**

a. The department's electronic Records Management Manual contains the records management information required by Iowa Code chapter ~~304~~ 305, including descriptions of department records and their formats, management, maintenance, storage, retention, security, and disposal.

b. ~~Chapter III of the~~ The manual also contains the descriptive information on records that is required by Iowa Code section 22.11. ~~Chapter III, as revised through 2001, is made a~~ The manual is updated as needed and its provisions are made a part of these rules.

c. The manual is available for examination and copying at the department's records center and at various other departmental offices located throughout the state. A copy of the manual may also be obtained ~~at cost, upon request,~~ from the records center.

**4.1(5) Availability of open records.** Open records of the department are available to the public for examination and copying unless otherwise provided by ~~rule or statute~~ state or federal law, regulation or rule.

**4.1(6) and 4.1(7)** No change.

**4.1(8) Existing records.** A request for access shall apply only to records that exist at the ~~times~~ time the request is made and access is provided. The department is not required to create, compile or procure a record solely for the purpose of making it available. EXCEPTIONS: See Iowa Code section 22.3A and subrule ~~4.4(5)~~ 4.4(4).

**4.1(9)** No change.

This rule is intended to implement Iowa Code chapter 22 and section ~~304.17~~ 305.15.

ITEM 2. Amend subrule 4.3(7) as follows:

**4.3(7) Copies.** A photocopy of an open record may be made on department photocopiers. If a photocopier is not available in the office where an open record is kept, the custodian shall permit its examination in that office and, if requested, arrange to have a copy made elsewhere. Most department records are stored in electronic formats; therefore, if the requested record is electronic, an electronic copy will be provided. If the requester is unable to open and read an electronic copy, or if the record does not exist in electronic form, a hard copy will be provided.

ITEM 3. Amend subrule 4.3(8) as follows:

**4.3(8) Fees.** The department may charge fees for records as authorized by Iowa Code section 22.3 or another provision of law. Under Iowa Code section 22.3, the fee for the copying service, whether electronic or hard copy, shall not exceed the cost of providing the service.

ITEM 4. Amend rule 761—4.4(22) as follows:

**761—4.4(22) Access to confidential records.** The following provisions are in addition to those specified in rule 761—4.3(22) and are minimum requirements. A statute or another department rule may impose additional requirements for access to certain classes of confidential records. A confidential record may, due to its nature or the way it is compiled or stored, contain a mixture of confidential and nonconfidential information. The department shall not refuse to release the nonconfidential information simply because of the manner in which the record is compiled or stored.

**4.4(1)** No change.

**4.4(2)** *Release of confidential records by the custodian.* The custodian may release a confidential record or a portion of it:

*a. to e.* No change.

*f.* To the public information board pursuant to Iowa Code section 23.6.

**4.4(3)** *Release of confidential records by the director.*

*a.* No change.

*b.* Before the director of transportation releases a record to a person not covered in subrule 4.4(2), the director of transportation may notify the subject of the record of the impending release and may give the subject a reasonable amount of time to seek an injunction.

~~**4.4(4)** *Mixed record.* A confidential record may, due to its nature or the way it is compiled or stored, contain a mixture of confidential and nonconfidential information. The department shall not refuse to release the nonconfidential information simply because the record is compiled or stored in this fashion.~~

**4.4(5)** **4.4(4)** *Information released.* If a person is provided access to less than an entire record, the department shall take measures to ensure that the person is furnished only the information that is to be released. This may be done by providing to the person either an extraction of the information to be released, or a copy of the record from which the information not to be released has been deleted.

This rule is intended to implement Iowa Code section 22.11.

ITEM 5. Amend rule 761—4.6(22) as follows:

**761—4.6(22) Requests for confidential treatment.**

**4.6(1)** A person may request that all or a portion of a record be confidential. The request must be submitted in writing to the custodian and:

*a. and b.* No change.

*c.* Demonstrate that disclosure of the information would clearly not be in the public interest.

*e. d.* Give the reasons why the any person or persons would be aggrieved or adversely affected substantially and irreparably injured by disclosure of the information. The person requester may be required to provide any proof necessary to support these reasons.

**4.6(2)** and **4.6(3)** No change.

This rule is intended to implement Iowa Code ~~section~~ sections 22.8 and 22.11.

ITEM 6. Rescind rule 761—4.9(22) and adopt the following new rule in lieu thereof:

**761—4.9(22) Confidential records.** This rule describes the types of departmental information or records that are confidential. This rule is not exhaustive. A citation of the legal authority for confidentiality follows each description. The following records shall be kept confidential. Records are listed by category, according to the legal basis for withholding them from public inspection.

Descriptions:

**4.9(1)** Records which are exempt from disclosure under Iowa Code section 22.7.

**4.9(2)** Records which constitute attorney work product, attorney-client communications, or are otherwise privileged. (Attorney work product is confidential under Iowa Code sections 22.7, 622.10 and 622.11, Iowa R. C. P. 1.503, Fed. R. Civ. P. 26(b)(3), and case law. Attorney-client communications are confidential under Iowa Code sections 622.10 and 622.11, the rules of evidence, the Iowa Rules of Professional Conduct, and case law.)

**4.9(3)** Those portions of the department's staff manuals, instructions or other statements issued by the department which set forth criteria or guidelines to be used by its departmental staff in auditing, making inspections, settling commercial disputes or negotiating commercial arrangements, or in the selection or handling of cases, such as operational tactics or allowable tolerances or criteria for the defense, prosecution or settlement of cases, when the disclosure of such statements would enable law violators to avoid detection, facilitate disregard of requirements imposed by law, or give a clearly improper advantage to persons who are in an adverse position to the department. (Iowa Code sections 17A.2 and 17A.3)

**4.9(4)** The detailed minutes and recordings of closed sessions of the commission. However, if a closed session regards a real estate purchase or sale, the minutes and recording shall be available for public inspection when the transaction discussed is completed. (Iowa Code section 21.5)

**4.9(5)** Vehicle accident reports submitted to the department by drivers and peace officers. (Iowa Code sections 321.266 and 321.271)

*a.* However, access shall be granted to those persons authorized by Iowa Code section 321.271.

*b.* Reserved.

**4.9(6)** Unless otherwise ordered by the court, all information filed with the court for the purpose of securing a warrant for an arrest including, but not limited to, a citation and affidavits, until such time as a peace officer has made the arrest and has made the officer's return on the warrant, or the defendant has made an initial appearance in court. (Iowa Code section 804.29)

*a.* However, the information in the record may be disseminated without court order during the course of official duties to the persons authorized in Iowa Code section 804.29.

*b.* Reserved.

**4.9(7)** All information filed with the court for the purpose of securing a warrant for a search, including, but not limited to, an application and affidavits, until such time as a peace officer has executed the warrant and has made return thereon. (Iowa Code section 808.13)

*a.* During the period of time that information is confidential, it shall be sealed by the court, and the information contained therein shall not be disseminated to any person other than a peace officer, magistrate or other court employee, in the course of official duties.

*b.* Reserved.

**4.9(8)** Information obtained by the department from the examining of reports, returns or records required to be filed or kept under the provisions of Iowa Code chapter 452A, except where disclosure is authorized by Iowa Code chapter 452A. (Iowa Code section 452A.63)

**4.9(9)** Sealed bids, until the time set for the public opening of bids, whereupon bids are unsealed and no longer confidential. (Iowa Code section 72.3)

**4.9(10)** Those records which, if disclosed, would diminish competition or would give an improper advantage to persons who are in an adverse position to the department. These records shall be kept confidential until the transaction to which they relate is consummated. However, if disclosure would reveal information which would hinder future competition, the records shall be kept confidential. (Iowa Code sections 17A.2, 17A.3, 22.7 and 313.10, Iowa Code chapter 553, and 761—Chapter 20)

*a.* Examples of records which could, in the proper circumstances, be determined to be within this category include, but are not limited to:

(1) Detailed estimates of the cost of a proposed contract.

(2) Economic analyses for determining pavement types.

(3) Negotiations for a proposed contract.

(4) Methodology for determining unfair bidding practices or bid rigging.

(5) Price quotations solicited.

(6) The value of points assigned to a bid rating formula prior to the time set for public opening of bids.

(7) Laboratory testing reports of suppliers' products. These may also be trade secrets. The subject of the report has the right of access to it.

*b.* Reserved.

**4.9(11)** Audit reviews for determining equal employment opportunity contract compliance. (Iowa Code section 22.7 and 5 U.S.C. §§ 552 and 552a)

*a.* The subject of the audit review has the right of access to it.

*b.* Reserved.

**4.9(12)** All financial records and any information contained within them that are made available to the department, unless otherwise expressly permitted to be divulged by federal or state law. (Iowa Code sections 22.7 and 422.20 and 5 U.S.C. §§ 552 and 552a )

**4.9(13)** Personal information in any motor vehicle record, including personal information contained on electronic driver's license or nonoperator's identification card records that is provided by the licensee

or card holder to the department for use by law enforcement, first responders, emergency medical service providers, and other medical personnel responding to or assisting with an emergency. (Iowa Code sections 22.7 and 321.11 and 18 U.S.C. § 2721 et seq.)

*a.* Information other than personal information contained on electronic driver's license or nonoperator's identification card records that is provided by the licensee or card holder to the department for use by law enforcement, first responders, emergency medical service providers, and other medical personnel responding to or assisting with an emergency may be disclosed only as provided in Iowa Code sections 321.11 and 321.11A, 18 U.S.C. § 2721 et seq., and 761—Chapters 415, 610 and 611.

*b.* The subject of the personal information has the right of access to the information.

**4.9(14)** A report received by the department from a physician licensed under Iowa Code chapter 148, an advanced registered nurse practitioner licensed under Iowa Code chapter 152 and licensed with the board of nursing, a physician assistant licensed under Iowa Code chapter 148C or an optometrist licensed under Iowa Code chapter 154 regarding a person who has been diagnosed as having a physical or mental condition which would render the person physically or mentally incompetent to operate a motor vehicle in a safe manner. (Iowa Code section 321.186)

**4.9(15)** Certain records regarding undercover driver's licenses issued to peace officers, as specified in 761—Chapter 625. (Iowa Code sections 22.7 and 321.189A)

*a.* The subject of the record and the head of the law enforcement agency employing the subject have the right of access to the record.

*b.* Reserved.

**4.9(16)** Records related to confidential plates issued for government vehicles. (Iowa Code section 321.19)

*a.* The head of the agency to which the vehicle is assigned has the right of access to the record.

*b.* Reserved.

**4.9(17)** Certified transcripts of labor payrolls (also known as certified payroll records) filed by contractors for federal-aid construction contracts, in accordance with the following paragraphs. (Iowa Code section 22.7, 5 U.S.C. §§ 552 and 552a, and 42 U.S.C. § 405)

*a.* The social security numbers in a certified payroll record are confidential. The record itself may be confidential if its release would give advantage to competitors and serve no public purpose.

*b.* The prime contractor and subcontractor, if applicable, that filed the record have the right of access to it.

*c.* Certified payroll records shall be released to the U.S. Department of Labor and Federal Highway Administration during investigations.

*d.* The custodian may release a certified payroll record with social security numbers withheld to representatives of the Iowa Labor Management Work Preservation Fund.

*e.* The custodian may release a certified payroll record with social security numbers withheld to persons outside the department other than the persons listed in paragraphs 4.9(17) "b" to "d" according to the following procedure:

(1) The request for the record must be in writing.

(2) The custodian shall send a copy of the request by registered mail to the prime contractor. If the request is for subcontractor information, the custodian shall send copies of the request to both the subcontractor and prime contractor.

(3) The requested record shall not be released until 14 calendar days have expired from receipt of the request by the contractor(s) to give the contractor(s) an opportunity to seek an injunction.

**4.9(18)** Information concerning an open or pending railroad accident investigation conducted on behalf of or in conjunction with the Federal Railroad Administration or National Transportation Safety Board to the extent necessary to prevent denial of funds, services or essential information from the United States government. (Iowa Code section 22.9)

**4.9(19)** A geographic computer database, except upon terms and conditions acceptable to the department. (Iowa Code section 22.2)

**4.9(20)** Confidential information, as defined in Iowa Code section 86.45, filed with the workers' compensation commissioner. (Iowa Code section 22.7)

**4.9(21)** An intelligence assessment and intelligence data under Iowa Code chapter 692, except where disclosure is required or authorized by the Iowa Code. (Iowa Code chapter 692 and Iowa Code section 22.7)

**4.9(22)** Information in a record that would permit the commission, subject to Iowa Code chapter 21, to hold a closed session pursuant to Iowa Code section 21.5 in order to avoid public disclosure of that information, until such time as final action is taken on the subject matter of that information or unless otherwise authorized by the Iowa Code. (Iowa Code section 22.7)

**4.9(23)** All other information or records that by law are or may be confidential.

This rule is intended to implement Iowa Code chapters 22, 553 and 692; Iowa Code sections 17A.2, 17A.3, 21.5, 72.3, 313.10, 321.11, 321.11A, 321.19, 321.186, 321.189A, 321.266, 321.271, 422.20, 452A.63, 622.10, 622.11, 804.29 and 808.13; 5 U.S.C. §§ 552 and 552a; 18 U.S.C. § 2721 et seq.; and 42 U.S.C. § 405.